United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,048

WOODWARD & LOTHROP, INC.,

Appellant,

v.

DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION BOARD and JOHN L. HARRIS,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Whether, in an unemployment compensation claim, appellant had standing, as the most recent employer, to prosecute an appeal under the District of Columbia Unemployment Compensation Act.

2. Whether appellee Harris, as a claimant under the District of Columbia Unemployment Compensation Act, had the burden of proof in establishing his eligibility for unemployment compensation benefits.

3. Whether the mere filing of an unemployment compensation claim by appellee Harris was sufficient to support a finding of "availability" within the meaning of the District of Columbia Unemployment Compensation Act.

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*Cases and statute chiefly relied on.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is a statutory appeal under the District of Columbia Unemployment Compensation Act from an order of the United States District Court for the District of Columbia upholding the decision of appellee District of Columbia Unemployment Compensation Board, which affirmed an award of unemployment compensation benefits to appellee Harris. Jurisdiction

in this Court is based upon D.C. Code § 46-312 (1961). The decision of appellee Board, the appeal papers filed in the District Court and the final judgment appear at pages 9-15, 18-19 of the Joint Appendix.

STATEMENT OF THE CASE

This is a statutory appeal from the judgment of the District Court upholding the decision of appellee District of Columbia Unemployment Compensation Board, which affirmed an award of unemployment compensation benefits to appellee Harris. The record shows the following facts:

On February 25, 1965, appellee Harris initiated a claim for unemployment compensation benefits with appellee Board. (J.A. 2-5) On March 9, an initial *ex parte* determination made by appellee Board's claims examiner awarded benefits to Appellee Harris. (J.A. 3) Pursuant to this determination, appellee Harris filed claims with appellee Board on March 9, March 16 and March 22, and received benefits for the weeks ending March 6, March 13 and March 20, 1965. (J.A. 2-5)

Appellant appealed the determination of the claims examiner on the ground that appellee Harris was not "available" within the meaning of the District of Columbia Unemployment Compensation Act (D.C. Code § 46-309(d)) and therefore not eligible for benefits. (J.A. 8) A hearing on this appeal was held by appellee Board's appeals examiner on April 5, 1965. (J.A. 8) Appellee Harris did not appear at the hearing. (J.A. 8)

At the April 5 hearing, appellant presented testimony which showed that appellee Harris was last employed by appellant for the period November 24, 1964 to December 26, 1964. (J.A. 8) On applying for employment with appellant, appellee Harris filled out and signed a "Statement of Availability for Temporary Employment" in which claimant stated that he was available for work only until December 26. (J.A. 7) The Statement also contained the following paragraph:

> I also understand that Woodward & Lothrop does have or will have other openings of a full time or part time nature and that if I wish to continue my employment beyond the above date [December 26] or otherwise change the work schedule of hours indicated below that I will give my personnel office advance notice in writing by completing the reverse side of this form. (J.A. 7)

Appellee Harris never completed the reverse side of said Statement. (J.A. 16-17) Appellant's testimony also showed that by letter dated March 17, it had offered appellee Harris permanent employment and that appellee Harris had declined this offer. (J.A. 6)

No evidence was presented at the hearing of a search for employment by appellee Harris. Nor was there any evidence that appellee Harris had received job referrals from the United States Employment Service. The only evidence introduced on behalf of appellee Harris was his unemployment claim record. (J.A. 2-5) One of the items of this claim record was a certification which stated, in part, as follows: "I certify that during each such week [claim or benefit week] I was physically able to work and available for work." (J.A. 3) In a decision dated April 15, 1965, appellee Board's appeals examiner affirmed the initial determination allowing benefits and noted in his decision that: "[A]n individual's certification when applying for benefits will ordinarily be accepted as sufficient evidence of his availability." (J.A. 9)

Appellant appealed from this decision to appellee Board. A hearing was held on this appeal on May 11, 1965. Appellee Harris did not appear at this hearing. (J.A. 17) No further evidence to substantiate or support appellee Harris' claim was introduced. Appellee Board affirmed the decision of its appeals examiner and cited as reason therefor the following:

> The claimant having certified his availability for work

> before interviewers of the Board on four different occasions established a *prima facie* case of availability and the employer did not offer sufficient evidence to rebut the claimant's case. (J.A. 9)

Appellant appealed the Board's decision to the United States District Court for the District of Columbia on June 16, 1965. (J.A. 10) A hearing was held by that court on appellant's and appellee Board's cross motions for summary judgment on January 12, 1966. During oral argument, the lower court, *sua sponte*, questioned the standing of appellant. (J.A. 18) The lower court also indicated during the course of argument that its decision would be influenced by the fact that appellant's experience rating under the Act would not be affected in this case. (J.A. 18) The lower court thereupon entered judgment for appellees. (J.A. 18-19) Notice of appeal was seasonably filed by appellant. (J.A. 19)

STATEMENT OF POINTS

The lower court erred in:

1. Affirming the decision of appellee Board on the basis that appellant did not suffer any direct financial loss as a result of said decision.

2. Affirming the decision of appellee Board awarding unemployment compensation benefits to appellee Harris where there was no substantial evidence in the record to sustain the decision of appellee Board.

SUMMARY OF ARGUMENT

Appellant appeals from the judgment of the lower court affirming an award of unemployment compensation benefits to appellee Harris.

It is clear from a reading of the District of Columbia Unemployment Compensation Act that appellant, as the most recent employer of appellee Harris, had standing to appeal the initial award of benefits to appellee Harris. The terminology and underlying philosophy of the Act,

the public policy issues involved, the long-standing administrative interpretation of the Act by appellee Board, all indicate clearly that appellant was an interested party to these proceedings. Consequently, the trial court's decision, based as it was on its characterization of appellant as having a nominal standing only, was in error.

The District of Columbia Unemployment Compensation Act requires that a claimant show his eligibility for benefits. In accordance with this requirement, an unemployment compensation claimant bears the burden of proof to establish eligibility and all attendant prerequisites.

The District of Columbia Act requires, as a prerequisite to a finding of eligibility, a finding that the claimant was "available" for employment. The decisional law conclusively demonstrates that, inherent in this concept of availability, there is a requirement that a claimant actively search for employment. It is also clear that the mere filing of a claim does not establish availability. Appellee Harris never demonstrated his availability, within the above precepts, and consequently the decision of appellee Board awarding unemployment compensation benefits to him was without evidentiary foundation and contrary to law.

Even assuming that appellee Harris had made out a *prima facie* case of availability, the record evidence presented by appellant, along with all proper inferences to be derived therefrom and from appellee Harris' actions, completely rebutted any *prima facie* case.

ARGUMENT

I

Appellant Had Standing To Challenge the Decision of Appellee Board in the Instant Case

At oral argument before the District Court, the issue of appellant's standing to challenge the decision of appellee Board in the instant case was raised *sua sponte* by the lower court. The lower court viewed appellant as having "nominal" standing (J.A. 18) and the lower court based its decision thereon.[1]

Appellant urged below, as it does here, that if it has standing it matters not the quality of that standing. There is no such thing as "nominal" standing. Standing is a judicial fact, much like jurisdiction, and is not susceptible of modifiers such as "nominal" or "substantial." There is only standing, or lack of standing. If appellant had standing to prosecute this appeal, the nature or quality of that standing is irrelevant and had no bearing on the issues of the instant case.

In order to put the question of standing in its proper perspective, it would seem advisable to delineate briefly the workings of the unemployment compensation system. The system provides a type of insurance protection against involuntary unemployment. *Saunders v. Maryland Unemployment Compensation Bd.*, 188 Md. 677, 53 A.2d 579, 581 (1947). The "premiums" for unemployment insurance coverage are provided in the form of employer contributions to a District unemployment fund. D.C. Code §§ 46-302-03 (Supp. V, 1966). A standard rate of 2.7 per cent of annual wages is set for employer contributions (D.C. Code § 46-303

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[1] "The Court: If Woodward & Lothrop stood to lose anything by reason of these payments, the Court might consider your argument had some merit. But here, on this record, I am disposed to grant the motion of the Board." (J.A. 18)

(b)) but provision is also made for a contribution system based on the unemployment experience of the individual employer. (D.C. Code § 46-303(c)). Under this system separate accounts are established within the fund for each employer. Contributions paid by an employer are deposited in his account and benefits chargeable against the employer are charged against it. *(Ibid.)* The excess of contributions over benefits is known as the individual employer's reserve. Said reserve serves as a computational base for determination of the individual employer's annual contribution to the fund. (See D.C. Code § 46-303(c)(8).)

Under the statute, benefits payable to a claimant are chargeable to the account of his base period employer, as defined by the Act. See D.C. Code §§ 46-303(c)(2), -303(c)(9)(c)-(d), -301(f), (h). In this case, appellant was the most recent employer of appellee Harris but was not a base period employer and consequently, benefits paid to appellee Harris were not charged against appellant's individual account. For this reason, the lower court characterized appellant as having "nominal" standing and, on the basis thereof, rendered judgment for appellees. (J.A. 18-19)

The statutory provisions relating to the parties involved in unemployment compensation proceedings are D.C. Code §§ 46-311-12. Section 46-311 provides that claims shall be made "in accordance with such regulations as the Board may prescribe" and that the claimant *and* "interested parties" shall be given notice of, and be permitted to appeal from, initial claims determinations. It is further provided that the claimant "or any party to the determination" may appeal. In subsection (e) it is stated: "The Board, under regulations prescribed by it, may permit further appeal by any party. . . ." Finally, D.C. Code § 46-312 provides that "any party to the proceeding" may seek judicial review.

Appellant was a "party" to the administrative proceedings from the time notice was given to it of the initial determination of the appellee

Board's claims examiner.[2] Clearly, in the view of appellee Board, appellant was an "interested party" within the meaning of D.C. Code § 46-311. And, this is the view set forth by appellee Board in its regulations. Regulation IX of appellee Board's *Rules and Regulations Relating to Employers* recites, in pertinent part:

> "Any claimant, *his most recent employer* and any of his base period employers may appeal to the Board from the determination of any agent of the Board with respect to the payments of benefits to such claimant provided the appeal is filed within ten days after notification thereof or after the date such notification was mailed to his last known address." (Section 11 of the Act) [Emphasis added.]
>
> "Within thirty days after the decision of the Board has become final, either party may appeal to the District Court of the United States for the District of Columbia, and subsequently to the Court of Appeals." (Section 12 of the Act.)

At no time during the administrative and judicial hearings in the instant case has appellee Board contested appellant's standing. Presumably, it does not do so now. It is the long-standing administrative interpretation of appellee Board that a most recent employer, *qua* most recent employer, is an interested party within the meaning of the Act.

Appellant concedes that this Court is not bound by this long-standing administrative interpretation since statutory interpretation is *essentially and finally* a judicial function. Appellant urges, however, that a reasonable construction and interpretation of the statute can only lead to

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[2] Notice was given to appellant pursuant to a Board regulation which provides: "When a Claim Deputy has made a determination as to an individual's right to benefits in accordance with subsection 11(b) of the Act, he shall promptly give notice of such determination and the reasons therefor to the claimant, *his most recent employer* and to each of claimant's base period employers." [*Rules and Regulations Relating to Employees*, Reg. IV A. (Emphasis added.)]

the conclusion that the most recent employer has standing to prosecute appeals under the Act.

The lower court was impressed with the fact that benefits paid to appellee Harris would not be charged to appellant's individual account and that appellant thus did not suffer any direct financial injury. While this approach has a certain surface appeal, appellant contends that such an analysis ignores other relevant factors. For example, it would seem self-evident that an employer, as a contributor to the fund, has an interest in its proper disbursement. Since the fund is composed of employer contributions, the employer is affected directly and specially by disbursements therefrom. See *Susquehanna Collieries Co. v. Unemployment Compensation Bd. of Review*, 338 Pa. 1, 11 A.2d 880, 882 (1940). For the Act clearly provides that when the fund drops below a certain level, employer contributions shall be assessed at the standard rate of 2.7%, regardless of experience rating. D.C. Code §§ 46-303(c)(4)(ii)-(iii). It would seem, therefore, that the language of the Michigan Supreme Court in *Chrysler Corp. v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941), is clearly applicable:

> As a contributor to the fund, having an interest in its proper disbursement, it was the right of the corporation, *if not its duty*, to see that the purpose and full integrity of the fund was preserved. [298 N.W. at 92-93. (Emphasis added.)]

An even more basic and cogent reason, related to the nature of the statute involved, supports a finding that the most recent employer has standing. Payment of unemployment compensation benefits is not automatic. Instead, it must be *found* that a claimant is eligible for benefits and that no disqualifying factors exist. See D.C. Code §§ 46-309-10. Since the Act requires findings of eligibility and lack of disqualifying factors and provides for notice to the claimant and interested parties, it is evident that the Act contemplates or envisions some sort of ad-

versary proceeding where the relevant facts may be sifted and the requisite findings made. The most recent employer, by reason of his status, is the party most likely to know of the reason for the termination of a claimant's employment and of any disqualifying factors. He is, in a sense, an essential party to *valid* findings by the Board. As a contributor to the fund and as a representative of the base period employers, the most recent employer is at least under a moral duty to oppose unjustifiable claims. As pointed out in *Susquehanna Collieries Co. v. Unemployment Compensation Bd. of Review, supra:* "If there is any contest or room for contest, the [most recent] employer becomes an actual participant in the controversy." 11 A.2d at 882.

To deprive the most recent employer of standing to contest unemployment compensation claims, would, in effect, emasculate the regulating provisions of the Act (§§ 46-309-10), thus altering or modifying the underlying philosophy of the Act from one of insurance or merit to a welfare concept. For, in such a state of affairs, the most recent employer would not be entitled to notice of claims determinations nor would he be entitled to participate in the proceedings.

Thus, a most vital element in the policing or supervision of claims would be eliminated. Surely, this is not the intent of Congress nor does it comport to the rationale or philosophy of the Act.

Appellant submits that the rationale of the Act and the attendant public policy issues dictate a conclusion that appellant had standing to contest the instant claim. Appellant further submits that the lower court erred in basing its decision on what it termed the "nominal" standing of appellant.

II

Appellee Harris Had the Burden of Proof in Establishing His Eligibility for Benefits

Unemployment compensation statutes in general, and the District of Columbia Act in particular are predicated on an insurance or merit philosophy and not on a welfare concept. The mere fact of unempioyment does not give rise to the payment of benefits. There must be a *showing* that a claimant is *eligible* and that no disqualifying factors exist. See D.C. Code §§ 46-309-10.

D.C. Code § 46-309 provides in pertinent part:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been *found* [3] by the Board —
>
> (a) that he has made a claim for benefits with respect to such week in accordance with such regulations as the Board may prescribe;
>
> * * *
>
> (d) that he is available for work *and* has registered and inquired for work at the employment office designated by the Board. . . . [Emphasis added.]

The wording of the statute clearly demonstrates that the filing of a claim, availability for employment, registration, all are separate, independent prerequisites to a finding of eligibility. The claimant must show that all these factors are present.

It is elementary law that the party pleading the affirmative of an issue bears the burden of proving same. The courts have unanimously held that a claimant for unemployment compensation benefits bears the

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[3] It is clear that such a finding must be based on substantial evidence. See D.C. Code §§ 46-311(f), -312(a) (1961).

burden of proof in establishing his eligibility for benefits. See, *e.g.*, *Hudson v. Hecla Mining Co.*, 86 Idaho 447, 387 P.2d 893, 895 (1963); *Farrar v. Director of Division of Employment Security*, 324 Mass. 45, 84 N.E.2d 540, 543 (1949); *Clapp v. Appeal Bd.*, 325 Mich. 212, 38 N.W.2d 325, 328 (1949); *Virginia Employment Comm'n v. Coleman*, 204 Va. 18, 129 S.E.2d 6, 9 (1963). In *Haynes v. Unemployment Compensation Comm'n*, 353 Mo. 540, 183 S.W.2d 77 (1944), the availability of claimant for work was in issue. The court stated, 183 S.W.2d at 80:

> [W]e think it is apparent that the burden of proof to establish a claimant's right to benefits under the Unemployment Compensation Law rests upon the claimant . . . . An unemployed individual is eligible to receive benefits only if the commission finds that the required conditions have been met. The claimant assumes the risk of non-persuasion and we think the general rule applicable to ordinary court proceedings applies. "The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue. . . ."

In *Hyman v. South Carolina Employment Security Comm'n*, 234 S.C. 369, 108 S.E.2d 554 (1959), the court described this principle in a somewhat different manner:

> The lower Court was in error in holding that since the appellants [Commission] injected into the trial of the case the issue of the availability of the respondent for work, that the burden was upon the appellants to present all of the facts at its disposal pertaining to the availability of the respondent for work, including what opportunities for work existed for him at the time or period in question. *There was no burden upon the appellants to show that the respondent was not available for work. The burden was upon the respondent to show that he was available for work.* [*Id.* at 556. (Emphasis added.)]

This procedural rule finds its basis in common sense and experience. Obviously, the facts and circumstances relating to the availability of a claimant are peculiarly within his knowledge and at his disposal. Correspondingly, it is fit that the claimant bear the burden of supporting his claim when his eligibility is questioned. *Cf. Florida Indus. Comm'n v. Ciarlante,* 84 So. 2d 1, 4-5 (Fla. 1955).

III

Appellee Harris Did Not Show an Active Search for Employment and Thus Did Not Sustain the Burden of Proof

Throughout the several appeals in the instant case appellant has maintained that appellee Harris has not demonstrated his availability for work and, therefore, that he was not eligible for benefits. Availability, within the meaning of unemployment compensation statutes, is not restricted to a passive willingness to accept employment. An unemployment compensation claimant may not simply sit idly by and wait for employment to seek him out. The decisional law makes it clear that, inherent in the concept of availability, is the requirement that the claimant *actively* search for employment. In some 27 jurisdictions this requirement has been expressly incorporated into the statute. See *Cramer v. Employment Security Comm'n,* 90 Ariz. 350, 367 P.2d 956, 959 (1962). But it has been stated that express incorporation is only statutory clarification of this requirement. See *Shannon v. Bureau of Unemployment Compensation,* 155 Ohio St. 53, 97 N.E.2d 425, 427 (1951); *Cramer v. Employment Security Comm'n, supra.*

> Under the Unemployment Compensation Statute, the requirement that the claimant be "available for work" means not merely that he register for employment with an expressed willingness to work, but also that he actively look for work. [*Newkirk v. Florida Indus. Comm'n,* 142 So. 2d 750, 752 (Fla. App. 1965).]

Appellee Board never addressed itself to the question of whether appellee Harris had shown an active search for employment. Instead, appellee Board based its decision in the instant case on the thesis that registration by appellee Harris on four different occasions established a *prima facie* case of availability which shifted the burden of proof to appellant. (J.A. 9) In doing so appellee Board adopted a position which has met with almost universal rejection. In *Cramer v. Employment Security Comm'n, supra,* the Arizona Supreme Court rejected the view that registration raised a rebuttable presumption of availability and stated:

> Arizona is in accord with the majority rule that the burden of proving availability is upon the claimant, and that the mere act of registration gives him no procedural advantage in establishing the merits of his claim. [367 P.2d at 959.][4]

The Arizona court concluded its discussion by stating:

> It is true that the Employment Security Act is remedial and should be liberally construed in keeping with its beneficent purposes. *But this rule alone cannot displace the requirement that claimant show why he is entitled to benefits under the act. . . .* "The basic policy of the law is advanced as well when benefits are denied in improper cases as when they are allowed in proper cases." [*Id.* at 960. (Emphasis added.)][5]

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[4] *Accord, Department of Indus. Relations v. Tomlinson*, 251 Ala. 144, 36 So. 2d 496 (1948); *Florida Indus. Comm'n v. Ciarlante, supra*: *Mohler v. Department of Labor*, 409 Ill. 79, 97 N.E.2d 762 (1951); *Bennett v. Review Bd.*, 122 Ind. App. 14, 102 N.E.2d 382 (1951) (semble); *Chadwick v. Employment Security Bd.*, 192 Kan. 769, 300 P.2d 1017 (1964); *Dwyer v. Appeal Bd.*, 321 Mich. 178, 32 N.W.2d 434 (1948); *Shannon v. Bureau of Unemployment Compensation, supra*: *Hyman v. South Carolina Employment Security Comm'n, supra.*

[5] *Accord, Teague v. Florida Indus. Comm'n*, 104 So. 2d 612, 616 (Fla. App. 1958).

The specific issue in the instant case is whether a finding of availability may be based solely on appellee Harris' registration for work and certification of availability. This very question was ruled upon in *Huiet v. Schwab Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943). The court there phrased the issue as follows, 27 S.E.2d at 746:

> [W]hether, in the absence of other evidence, the applicant's act of registering for work and the signing and filing of a claim for unemployment benefits in which the applicant states, "I am unemployed, able to work and available for work and registered for work," would be sufficient to authorize the commissioner of the Department of Labor to find that the applicant is "able to work and available for work," within the meaning of section 4, relating to eligibility.

The court responded by stating:

> We answer this question in the negative. The filing of some kind of claim is essential to recovery of unemployment benefits, and the statements contained therein should be proved in some way. . . . In this case the applicant's statement that she is able to work and available for work does not fall within any exception to the general rule, *but is a mere self-serving declaration, without probative value*. It is like the unverified allegations in any other pleading, which cannot prove themselves, but must be sustained by evidence, in order for the pleader to prevail. [*Ibid.* (Emphasis added.)]

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In *General Motors Corp. v. Baker*, 92 Ohio App. 301, 110 N.E.2d 12 (1952) the claimant filed a claim which was allowed by the administrator. An administrative appeal was taken by the employer. *The claimant did not appear and did not offer any evidence.* The initial determination allowing benefits was upheld by the Board. On appeal this determination was reversed by a court of first instance. This judgment of re-

there is still some merit to claim if estoppel but why did he [illegible] benefit requests?

versal was affirmed by the Ohio appellate court which stated in its opinion, 110 N.E.2d at 16:

> [T]his court specifically holds that the mere filing of a claim for benefits carries with it no presumption of its validity. No evidence was presented by the claimant in support of the claim at either hearing. There was no competent evidence adduced to support the finding of the referee. *The decision of the referee was unlawful, unreasonable and against the manifest weight of the evidence.* . . . [Emphasis added.]

In *Ashford v. Appeal Bd.*, 328 Mich. 428, 43 N.W.2d 918 (1950), the referee made a finding of availability on the basis of the claims record which included the application for benefits and the registration of the claimant. The referee held that these papers made a *prima facie* case and, absent any proof from the employer, called for dismissal of the employer's administrative appeal. The Appeal Board argued on appeal to the Michigan Supreme Court that (1) after determination by a claims examiner allowing a claim the burden of proof shifted to the employer, and (2) the claims record made out a *prima facie* case and the burden was on the employer to offset this *prima facie* case. The court rejected these contentions and stated, 43 N.W.2d at 920:

> Nothing in the statute indicates an intention to establish a rule contrary to all ordinary court proceedings. Plaintiff filed a claim. Introduction of that claim or application into evidence did not operate to establish it. *The claim does not prove itself. Neither do the determinations by claims examiners prove it.* [Emphasis added.]

In the instant case the only evidence adduced to support a finding of availability was the claims record of appellee Harris which indicated that on four occasions he had represented that he was "available" for work. The authorities presented by appellant herein conclusively dem-

onstrate that such a showing is wholly inadequate to support a claim for benefits when the claimant's eligibility therefor is questioned.

The appeals examiner in the instant case alluded in his decision to the fact that there was no evidence of refusal by appellee Harris of job referrals from the United States Employment Service (J. A. 8-9) Surely, this negative finding cannot be considered sufficient to sustain the claim of availability. Neither the language nor the spirit of the Act restrict claimant's duties under § 46-309(d) to registering with the United States Employment Service. Instead, this is only *one* of the measures a claimant must take to show his availability. A claimant must actively seek out employment, wherever it might be, and cannot restrict his job contacts to referrals from the United States Employment Service. Where the availability of a claimant is a contested issue, such claimant must show more than a dearth of job referrals from the Employment Service. The Act does not constitute the United States Employment Service as the sole conduit for job contacts. The role of the employment service was described in *Shannon v. Bureau of Unemployment Compensation*, *supra*, where the court stated, 97 N.E.2d at 427:

> The registered claimant should not be absolved from all duty to help himself and to make reasonable effort to pursue employment merely because the state . . . maintains an employment office and makes the services of that office available to those out of employment to assist them in finding jobs. *The efforts of the employment office are intended to supplement and not to entirely supplant the individual's efforts.* [Emphasis added.]

IV

The Record Evidence Completely Rebutted Any Prima Facie Showing of Availability

Even assuming, *arguendo*, the existence of a *prima facie* case of availability, appellant submits that the record evidence completely rebuts any such presumption. The record instead conclusively demonstrates appellee Harris' *unavailability*. To begin, the record shows that appellant, in its employment form, set forth a procedure by which an employee might indicate to appellant his desire for permanent employment. (J.A. 7) Appellee Harris did not follow this procedure and never indicated to appellant his availability for employment. (J.A. 16-17) The record further shows that appellant, on learning of appellee Harris' availability (by reason of his claim for benefits), offered appellee Harris permanent employment. This offer was refused. (J.A. 6) This refusal is competent evidence of a continuing course of conduct indicating unavailability.

Finally, appellee's absence at both hearings on this contested claim and his failure to introduce evidence supporting his claim of availability and eligibility properly raise an inference that appellee Harris could not produce any such evidence, indeed, that any testimony produced by him would have been unfavorable. Such an inference by itself would justify a finding of unavailability. When added to the uncontradicted evidence relating to appellee Harris' prior and continuing course of conduct (including his refusal of the only employment offer shown by the record) a conclusion of unavailability is inescapable.

CONCLUSION

Appellant submits that the language and underlying philosophy of the District of Columbia Unemployment Compensation Act dictate a conclusion that appellant, as the most recent employer of appellee Har-

ris, had standing to prosecute an appeal of the award of benefits to appellee Harris. In connection therewith, appellant further submits that the lower court's decision — based on its characterization of appellant as having "nominal" standing — was in error.

Appellant maintains that the record developed in the instant case contained no substantial, competent evidence to sustain appellee Board's finding of availability and the record was completely deficient in that respect. Appellant submits that appellee Harris failed to support his claim of availability, that appellee Board's decision lacked evidential support because it was not based upon substantial evidence in the record considered as a whole, and was therefore not in accordance with law.

Respectfully submitted,

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APPENDIX OF STATUTES AND REGULATIONS

District of Columbia Code

§ 46-311

(b) Promptly after an individual has filed a claim for benefits, an agent of the Board designated by it for such purpose shall make an initial determination with respect thereto which shall include a determination with respect to whether or not such benefit may be payable, and if payable, the week with respect to which payments will commence, the maximum duration thereof, and the weekly benefit amount, except that in any case in which the payment or denial of benefits will be determined by the provisions of section 46-310 (e), the agent shall promptly transmit such claim to an appeal tribunal which shall make a decision thereon after such investigation as it deems necessary, and after affording the parties opportunity for fair hearing in accordance with subsection (e) of this section, and the claimant and interested parties shall be given notice thereof and permitted to appeal therefrom to the Board and the courts as is provided in this chapter for notice of, and appeals from, decisions of appeal tribunals. An initial determination may, for good cause, be reconsidered. The claimant and other parties to the proceedings shall be promptly notified on the initial determination or any amended determination and the reasons therefor. Benefits shall be denied or, if the claimant is otherwise eligible, paid promptly in accordance with such initial determination except as hereinafter otherwise provided. The claimant or any party to the determination may file an appeal from such initial determination or from a reconsideration of such determination within ten days after notification there-

of, or after the date such notification was mailed to his last known address. If upon such initial determination benefits are allowed but the record of the case indicates that a disqualification has been alleged or may exist, benefits shall not be paid prior to the expiration of the period for appeal as hereinafter provided. If an appeal is duly filed with respect to a matter other than the weekly benefit amount or maximum duration of benefits, payable, benefits with respect to the period prior to the final decision of the Board shall be paid only after such decision; *Provided*, That if an appeal tribunal affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken. If, subsequent to such initial determination, benefits with respect to any week for which a claim has been filed are denied for reasons other than matters included in the initial determination, the claimant shall be promptly notified of the denial and the reasons therefor, and may appeal therefrom in accordance with the procedure herein described for appeals from initial determinations.

§ 46-311

(e) An appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall, unless such appeal is withdrawn, affirm or modify the finding of facts and the initial determination. The parties shall be duly notified of the decision of such appeal tribunal, together with the reasons therefor. The Board, under regulations prescribed by it, may permit further appeal by any party or may, upon its own motion, affirm, reverse, or modify the decision of the appeal tribunal or may set it aside and order a rehearing or the taking of additional evidence before the same or a different appeal tribunal. Unless a petition for such appeal is filed within ten days after the date of notification or mailing of the decision

of an appeal tribunal, or within such ten-day period the Board has taken action on its own motion in accordance with the provisions of this subsection, the decision of the appeal tribunal shall constitute the decision of the Board and shall be effective as such. Any decision of an appeal tribunal which is not so modified or so appealed within such ten-day period is final for all purposes, except as provided in section 46-312 (a), and is not subject to review by the District auditor. All decisions rendered by the Board affirming, reversing, or modifying any decision of an appeal tribunal shall become effective immediately, unless the Board shall otherwise order, and are not subject to review by the District auditor.

§ 46-312

(a) Within thirty days after the decision of the Board has become final, any party to the proceeding may appeal from the decision to the United States District Court for the District of Columbia. Upon the filing of any such appeal notice thereof shall be served upon the Board by the appellant and upon any other party to the proceedings. Such appeal shall be heard by the court at the earliest possible date and shall be given precedence over all other civil cases. It shall not be necessary on any such appeal to enter exceptions to the rulings of the Board and no bond shall be required for entering such appeal. In no event shall any appeal act as a supersedeas. In any appeal under this section the findings of the Board, or of the examiner or appeal tribunal, as the case may be, as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law: *Provided,* That no appeal shall be permitted under this section by any party who has not first exhausted his administrative remedies as provided by this chapter.

(b) An appeal may be taken from a decision of such court to the United States Court of Appeals for the District of Columbia.

District of Columbia Unemployment Compensation Board Rules and Regulations Relating to Employers

Regulation IX — Appeal and Review

"Any claimant, his most recent employer and any of his base period employers may appeal to the Board from the determination of any agent of the Board with respect to the payments of benefits to such claimant provided the appeal is filed within ten days after notification thereof or after the date such notification was mailed to his last known address." (Section 11 of the Act.)

"Within thirty days after the decision of the Board has become final, either party may appeal to the District Court of the United States for the District of Columbia, and subsequently to the Court of Appeals." (Section 12 of the Act.)

District of Columbia Unemployment Compensation Board Rules and Regulations Relating to Employees

Regulation IV — Determination of Claims and Appeals Therefrom

A. Determinations — Adjustment

When a Claim Deputy has made a determination as to an individual's right to benefits in accordance with subsection 11 (b) of the Act, he shall promptly give notice of such determination and the reasons therefor to the claimant, his most recent employer and to each of claimant's base period employers....

JOINT APPENDIX

INDEX TO JOINT APPENDIX

RELEVANT DOCKET ENTRIES

1965

Jun. 16 — Complaint, appearance

Jun. 16 — Summons copies (2) and copies (-) of Complaint issued #1 ser. 6/18/65. #2 ser. 6/24/65 filed.

Jul. 6 — Answer of deft. #1 to complaint; c/m 7/6/65; appearance of Louis Mackall, F. G. Gordon, Jr., James M. Portray, Jr. filed.

Oct. 28 — Motion of deft. #1 for summary judgment; P&A; statement; notice; c/m 10/28/65; MC 10/28/65. filed.

Nov. 12 — Motion of pltf. for summary judgment and opposition to deft's. motion for summary judgment; P&A; Statement; c/m 11/12/65; MC 11/12/65. filed.

Nov. 22 — Reply of deft. to motion for summary judgment; P&A's; c/m 11/22/65. filed.

Nov. 30 — Supplemental memorandum of P&A of appellant in support of motion for summary judgment; c/m 11/30/65. filed.

1966

Jan. 12 — Order denying pltf's motion for summary judgment and granting deft's motion for summary judgment. (N) Gasch, J.

Feb. 8 — Notice of appeal by pltf. from order of 1/12/66. Copies to James M. Protray, Jr. and John L. Harris. Deposit $5.00 by Ross. filed.

JA 2

1. SOCIAL SECURITY NUMBER [illegible] 04502

2. NAME (PRINT) JOHN LINDSAY HARRIS
(FIRST) (MIDDLE—MAIDEN NAME IF MARRIED)

ADDRESS (PRINT)
940 - 25TH ST. N.W. APT. 803 WASHINGTON, D.C. 20037
(NUMBER) (STREET) (CITY) (STATE)

L.O. NO. 82 [ ] 92 [1]

TELEPHONE NUMBER: FE 7-7562

3. DATE OF BIRTH: 11-18-21

4. MALE [1] FEMALE [ ]

LAST EMPLOYER (PRINT)

5. EMPLOYER'S BUSINESS NAME: WOODWARD + LOTHROP
STREET ADDRESS: F STREET & 10TH N.W.
CITY & STATE: WASHINGTON, D.C.

11. DATE YOU LAST WORKED: 12-26-64

12. WHY DID YOU LEAVE YOUR LAST JOB? [illegible]

6. HAVE YOU APPLIED FOR OR ARE YOU RECEIVING A RETIREMENT PENSION OR ANNUITY? NO [X] YES [ ] IF "YES", CHECK: SOCIAL SECURITY [ ] OTHER [ ]

7. HAVE YOU HAD FEDERAL MILITARY OR CIVILIAN SERVICE WITHIN THE PAST 18 MONTHS? YES [ ] NO [X]

FILING DATE: 2-25-65 (09-5)
PRIOR D. C. CLAIM: [illegible]

10. DEPENDENTS: DO YOU WHOLLY OR MAINLY SUPPORT A CHILD, STEPCHILD, WIFE, HUSBAND, PARENT, STEPPARENT, BROTHER, OR SISTER? CHECK APPROPRIATE BOX
YES [ ] NO [X]

DEPENDENTS CODE: [illegible]

NAME OF DEPENDENT	RELATIONSHIP	AGE	WORKING	WEEKLY INCOME

a. PRESENT ADDRESS
REASON UNABLE TO WORK

b. PRESENT ADDRESS
REASON UNABLE TO WORK

c. PRESENT ADDRESS
REASON UNABLE TO WORK

REMARKS (INCLUDING OTHER NAMES AND SOCIAL SECURITY NUMBERS)

[illegible] 1-01-02

UI [X] UCFE [ ] UCX [ ] OTHER [ ]
OCCUPATION TITLE: [illegible]
OCCUPATION CODE: [illegible] USES NO. 2
EMPLOYER'S TYPE OF BUSINESS: [illegible]

CERTIFICATION: I CLAIM BENEFITS PAYABLE BY THE DISTRICT UNEMPLOYMENT COMPENSATION BOARD AND CERTIFY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT. I AM AWARE THAT THE LAW IMPOSES PENALTIES FOR FALSE STATEMENTS MADE IN CONNECTION WITH MY CLAIM.

CLAIMANT'S SIGNATURE: X John Lindsay Harris

CLAIMS TAKER [illegible]
NEW CLAIM

DUCB 170 REV. 9/63

DISTRICT UNEMPLOYMENT COMPENSATION BOARD

DUCB 170-B (BACK) REV. 9/64

JA 3

Group 1

I hereby acknowledge that I have received a copy of the determination for which I sign below.

Claimant's Signature	Intv. Initials	Determination Disposition		Claimant's Signature	Intv. Initials
John L. Harris	JLH	☑ Delivered	Delivered ☐		
☐ Redetermination / ☐ Appeal — Date		☐ Mailed / Date 3-9-5	Mailed ☐ / Date	☐ Redetermination / ☐ Appeal — Date	

I certify that in my benefit rights interview today I have been informed of my rights and responsibilities in connection with this claim.

Claimant X John L Harris Date 3-9-5 Initials JLH

Last Employer Notice Mailed Date 3-9-5 Initials JLH

CLAIMANT'S CERTIFICATION OF ELIGIBILITY FOR BENEFIT PAYMENTS

I register for work and claim waiting-period credit or unemployment insurance benefits in accordance with the provisions of the District of Columbia Unemployment Compensation Act for each calendar week for which I sign below, and certify with respect to each week, that I have not received nor claimed benefits under another Federal or State Unemployment Insurance Law. I certify that during each such week I was physically able to work and available for work. I further certify that during each such week I was not engaged in full time employment and that my total earnings from all sources were as reported for each week for which I sign. To the extent that my claim for benefits is under a Federal Program, I further certify that I have not applied for and am not receiving an education, training or subsistence allowance from the Veterans Administration. I further certify (if applicable) that my status as to pregnancy is properly reported for each such week. I further certify that, with the exception of Social Security or disability benefits, I am not receiving neither have I applied for nor been awarded any amount as a retirement pension or retirement annuity except as reported. I am aware that the law imposes penalties for making any false statements in connection with this claim.

Pension None Type Amount Verif. Date

Pay No.	Week Ending Date	Earnings	Able Avail.	Pregnancy	Schooling	Retirement Annuity	Claimant's Certifying Signature	Date Filed	Interviewer	Bal.

1 DUCB 170-A attached

2 Clmt states I was laid off on 12-26-4

3 due to [illegible] I violated no company rules

4 according to my knowledge & I was hired as a

5 temporary Xmas employee & my work ended on 12-26-4

6 X John L Harris

7 Contacted Mr Wortman (347-5300) who stated Clmt

8 was hired on a temporary basis to end on or about

9 12-24-4 & that if Clmt wanted additional work beyond

10 that period he was supposed to sign a certificate of

11 availability. Further stated Clmt's temp work ended on

12 12-26-4 but could not state whether Clmt would have

gotten additional work for sure if he had signed & turned

in the Certificate of availability.

Held Clmt was involuntarily separated due to end of temp

work. Availability not in question since no evidence

that Clmt would have gotten additional work if he had

signed the Certificate of availability. Eligible as of

0C, [illegible] John C Harden, 3-9-5 [illegible]

JA 4

TYPE __ UCX __

Social Security Account Number	Initial	Initial	Last Name	O. C. Date	Expir. Date

Continued Claim Certification and Record of Visits

[illegible] register for work and claim waiting period credit or unemployment insurance benefits in accordance with the provisions of the District of Columbia Unemployment Compensation Act for each calendar week for which I sign below and certify with respect to each week that I have not received nor claimed benefits under another Federal or State Unemployment Insurance Law. I certify that during each such week I was **physically able** to work and **available** for work. I further certify that during each such week I was **not** engaged in full time employment and that my **total earnings** from all sources were as reported for each week for which I sign. To the extent that my claim for benefits is under a Federal Program I further certify that I have not applied for and am not receiving an **education, training** or **subsistence allowance** from the **Veterans Administration.** I further certify (if applicable) that my status as to **pregnancy** is properly reported for each such week. I further certify that, with the exception of Social Security or disability benefits I am not receiving neither have I applied for nor been awarded any amount as a retirement pension or retirement annuity **except** as reported. I am aware that the law imposes penalties for making any false statements in connection with this claim.

	Pay No.	Week Ending Date	Earnings	Able Avail.	Pregnancy	Schooling	Retirement Annuity	Claimant's Certifying Signature	Date Filed	Interviewer	Bal
1	wp	09-5	None	yes	–	–	0	X John L Harris	3-9	[illegible] 779	34
2	1	10-5	None	yes	–	–	0	X John L Harris	3-9	[illegible] 779	33
3	1st payment released 3-9-5 [illegible]										
4	2	11-5	N	y	–	–	0	x John L. Harris	3/16	JP 834	32
5											
6	The above determination allowing benefits without										
7	disqualification is affirmed. See Appeal #76 748 UI										
8	(dated) 4-15-65. Noted [illegible] 4-19-65										
9											
10											
11											
12											
13											
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24											
25											
26											
27											
28											

DUCB 173a Rev. 7-62 CLAIM RECORD CARD—CONTINUATION SHEET P [illegible]

JA 5

UI ☐ UCFE ☐ UCX ☐

Social Security Account Number			Initial	Initial	Last Name	O. C. Date	Expir. Date
241	40	4502	J	L	HARRIS	2-25-5	08-6

Continued Claim Certification and Record of Visits

I register for work and claim waiting-period credit or unemployment insurance benefits in accordance with the provisions of the District of Columbia Unemployment Compensation Act for each calendar week for which I sign below, and certify with respect to such week, that I have not received nor claimed benefits under another Federal or State Unemployment Insurance Law. I certify that during each such week I was physically able to work and available for work. I further certify that during each such week I was not engaged in full time employment and that my total earnings from all sources were as reported for each week for which I sign. To the extent that my claim for benefits is under a Federal Program, I further certify that I have not applied for and am not receiving an education and training or subsistence allowance from the Veterans Administration. I further certify (if applicable) that my status as to pregnancy is properly reported for each such week. I further certify that, with the exception of Social Security or disability benefits, I am not receiving neither have I applied for nor been awarded any amount as a retirement pension or retirement annuity except as reported. I am aware that the law imposes penalties for making any false statements in connection with this claim. 940 25th St N.W. #203

Line	Pay No.	Week Ending Date	Earnings	Able Avail.	Pregnancy	Schooling	Retirement Annuity	Claimant's Certifying Signature	Date Filed	Interviewer	Bal.
1		O. A.			Secretary			1-33.01			
2					Bootlegger II			1-01.02			
3		To appeals					3-23-5	[illegible]			
4		Det. signed			on			3-16-5 for W/E 11-5			
5	3	12-[illegible]	[illegible]					John L. Harris	3-29	108 B5	31
6	Resolved:	that the		decision	of the			appeals			
7	Examiner	dated					4-15-65	in the above entitled			
8	case	be affirmed						appeal [illegible]			
9	no interview						5-18-65	[illegible] Foster	5-20-65		
10											
11											
12											
13											
14											
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25											
26											
27											
28											

DUCB 173a Rev. 7-62 CLAIMS RECORD CARD—CONTINUATION SHEET P-4130

DUCS 119

DISTRICT UNEMPLOYMENT COMPENSATION BOARD
EMPLOYMENT SECURITY BUILDING
SIXTH AND PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20001

NOTICE OF REFUSAL OF WORK

THE FOLLOWING INFORMATION IS FURNISHED IN CONNECTION WITH AN OFFER OF WORK MADE IN COMPLIANCE WITH REGULATION VIII (H) OF THE RULES AND REGULATIONS RELATING TO EMPLOYERS, WHICH ARE PROMULGATED UNDER THE DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION ACT.

INDIVIDUAL'S NAME [illegible] ADDRESS [illegible] S. S. NO. 311-40-4502

INDIVIDUAL FORMERLY OCCUPIED SAME JOB: YES ☐ NO ☒ LOCATION OF JOB Wash DC

DUTIES AND NATURE OF WORK OFFERED [illegible]

BEGINNING DATE [illegible] DURATION OF WORK Permanent WAGES 1.50/hr HOURS PER WEEK 40

SHIFT [illegible] JOB REQUIRES JOINING OR RESIGNING FROM UNION: YES ☒ NO ☐

DATE OF OFFER 2/27/65 HOW MADE: BY LETTER ☒ BY TELEGRAM ☐ IN PERSON ☐

FAILED TO ANSWER OFFER X REFUSED OFFER _____ DATE OF REFUSAL _____

REASON FOR REFUSAL _____

JOB WAS OPEN AT TIME OF REFUSAL: YES ☒ NO ☐

FIRM NAME Lindenwald Lothing EMPLOYER NUMBER 53-0052

ADDRESS 11th & F Sts NW PHONE 347-1220 X835 DATE 3/25/65

SIGNED Simon W. Wiseman TITLE Employment Manager

(INSTRUCTIONS ON REVERSE)

JA 7

FORM 6121-16

Woodward & Lothrop
INCORPORATED

STATEMENT OF AVAILABILITY FOR TEMPORARY EMPLOYMENT

I understand that I have accepted a position which is temporary until on or about 12-24-64.

I have taken this position because I am only available until such date on the schedule indicated below.

I understand that I am employed to meet seasonal needs and will have other openings of a full time or part time nature and that if I wish to continue my employment beyond the above date or otherwise change the work schedule of hours indicated below that I will give my personnel office advance notice in writing by completing the reverse side of this form.

☑ Full time, 5 8-hour days, 40 hours per week.

Regular part time:

☐ Mon.____ ☐ Tues.____ ☐ Wed.____ ☐ Thurs.____

☐ Fri.____ ☐ Sat.____ ☐ Sun.____

☐ Part time, evenings and Saturdays.

☐ Reserve force, on call for 8-hour days.

11-17-64 (DATE) [signature] (SIGNATURE OF EMPLOYEE) 241-40-4502 (SOC. SEC. NO.) Jan E. Hamrick (PERSONNEL REPRESENTATIVE)

CARBON COPY TO EMPLOYEE

REQUEST TO PERSONNEL OFFICE FOR CHANGE IN SCHEDULE OR CONTINUED EMPLOYMENT

To Personnel Office

Store_____

I wish continued employment until_____

I wish to change my available hours to_____

_____

_____

I will visit the Personnel Office promptly for discussion before the date previously furnished you.

_____ (DATE) _____ (SIGNATURE OF EMPLOYEE)

_____ (DEPT. NO.)

_____ (EMPL. NO.)

DISTRICT UNEMPLOYMENT COMPENSATION BOARD

In re: Claim of:

John L. Harris
940 25th Street, N.W., #803
Washington, D.C. 20037

Social Security No. 241-40-4502

Appeal No. 16,748-UI

Appeal Filed March 18, 1965

DECISION OF APPEALS EXAMINER

On appeal by (employer) from determination dated March 9, 1965 allowing benefits without disqualification.

Issues: Availability for work.

Evidence: Claim record and testimony of Simon W. Workman, Employment Manager, Woodward & Lothrop, Inc., at a hearing on April 5, 1965. Although duly notified claimant did not appear at the hearing.

Applicable Provisions of the District of Columbia Unemployment Compensation Act:
Section: 9(d) (See reverse side of this page.)

FINDINGS OF FACTS:

Claimant worked as a salesman during the Christmas season on a temporary basis from last November 24 through December 26. His rate of pay was $1.15 per hour. He applied for unemployment benefits February 25 and has been classified by the United States Employment Service as a secretary and bookkeeper. By letter dated March 17 claimant's former employer offered him a permanent job as salesman at an hourly rate of $1.50. Claimant did not accept this offer. The employer contends that claimant is unemployed by choice and, therefore, should not be considered available for benefits. The record of this case does not disclose any indication that claimant has refused any job offers from the United States Employment Service.

In order to be eligible for benefits an individual must be available for work. This requires among other things registration for work with

the United States Employment Service and a readiness and willingness to accept offers of suitable work by the service. There is no indication in this case that claimant has refused any job referrals. Under these circumstances an individual's certification when applying for benefits will ordinarily be accepted as sufficient evidence of his availability. The evidence adduced at the hearing is not believed to be sufficient to overcome this presumption, nor is it believed that claimant's failure to accept the employer's offer of re-employment contained in its letter of March 17 is a basis for disqulaification. The reason for this conclusion is that work as a salesman is not believed to be sufficiently suitable for a claimant classified as a secretary and bookkeeper to require him to accept such work under penalty of disqualification.

DECISION: The above determination allowing benefits without disqualification is affirmed.

April 15, 1965 ALLEN WEIL, Appeals Examiner

- - - - - - - -

In Re: Claim of JOHN L. HARRIS
Social Security Number: 241-40-4502
Appeal Number: 16,748 UI

RESOLVED: That the decision of the Appeals Examiner dated April 15, 1965 in the above entitled case, be affirmed. The claimant having certified his availability for work before interviewers of the Board on four different occasions established a prima facie case of availability and the employer did not offer sufficient evidence to rebut the claimant's case.

Date: May 18, 1965

APPROVED BY THE BOARD

/s/ WALTER N. TOBRINER, Chairman

cc: Employer
Claimant
Legal
Appeals
Resolutions

[Filed June 16, 1965]

APPEAL FROM DECISION OF DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION BOARD

1. The jurisdiction of this Court is based upon Section 12(a) of the District of Columbia Unemployment Compensation Act (D.C. Code § 46-312(a) (1961 ed.)).

2. This is an appeal from the decision of appellee District of Columbia Unemployment Compensation Board (hereafter "Board"), dated May 18, 1965, awarding benefits to appellee Harris.

3. Appellant Woodward & Lothrop, Inc., is a District of Columbia corporation, authorized to do business in the District of Columbia, and was an interested party in the proceedings below as the most recent employer of appellee Harris.

4. Appellee Board is an agency of the District of Columbia Government and is authorized by statute to administer the District of Columbia Unemployment Compensation Act (hereafter "Act"). Appellee John L. Harris is a resident of the District of Columbia and claims to be entitled to benefits under the Act.

5. On February 25, 1965, appellee Harris initiated a claim for unemployment compensation benefits with appellee Board. A claims deputy of the Board found appellee Harris eligible for benefits. Benefits were paid for the weeks ending February 27, March 6, March 13 and March 20.

6. Appellant timely appealed to appellee Board's Appeals Examiner from the determination of the claims deputy contending that appellee Harris was ineligible for benefits because he was not available for work as required by Section 9(d) of the Act (D.C. Code § 46-309(d)).

7. Appellee Harris did not appear before the Appeals Examiner at a scheduled hearing on April 5, 1965. No evidence was presented on behalf of or for appellee Harris to show an active search for employment

by appellee Harris or the availability of appellee Harris for employment. Appellant, on the other hand, introduced evidence which showed that appellee Harris was not available for employment. The Appeals Examiner found, despite the complete absence of any substantiating evidence in the record, that appellee Harris was available for employment and thus eligible for benefits.

8. Appellant timely appealed this determination to appellee Board. Appellee Harris did not appear at the hearing before appellee Board and no evidence to substantiate his claim was presented. Yet, appellee Board, on the basis of a record devoid of any evidence to support appellee Harris' claim of availability, affirmed the decision of the Appeals Examiner.

9. There was no evidence in the record before appellee Board to sustain its affirmance of the Appeals Examiner and the findings of availability and eligibility. The evidence in the record, considered as a whole, was to the contrary; that is, no evidence was presented by appellee Harris to demonstrate his availability for employment and the evidence introduced by appellant showed that appellee Harris was unavailable.

10. The award of benefits by appellee Board, based on a finding of availability of appellee Harris, lacks evidential support because it is not based upon substantial evidence in the record considered as a whole and it is, therefore, not in accordance with law.

WHEREFORE, appellant prays that this Court reverse the decision of appellee Board and order that appellee Harris be found unavailable for employment and ineligible for benefits under the Act.

HOGAN & HARTSON

/s/ JOHN J. ROSS
/s/ PIERRE J. LAFORCE
Attorneys for Appellant

[Filed July 6, 1965]

ANSWER

Comes now the appellee, District of Columbia Unemployment Compensation Board, through its attorneys, and answers the Appeal as follows:

First Defense

Appeal fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the appeal as follows:

1. This appellee admits the allegations of this paragraph.

2. This appellee admits the allegations of this paragraph.

3. This appellee admits the allegations of this paragraph.

4. This appellee admits the allegations of this paragraph.

5. This appellee admits the allegations of this paragraph with the exception of the allegation that appellee Harris was paid benefits for the week ending February 27. This appellee affirmatively states that the appellee Harris was allowed waiting period credit for the said week.

6. This appellee admits the allegations of this paragraph.

7. This appellee admits that the appellee Harris did not appear before the Appeals Examiner at the scheduled hearing on April 5, 1965 but denies the remaining allegations of this paragraph. This appellee affirmatively states that the appellee Harris certified on his claim record card as to his availability for work and that this certification was approved by a Contact Representative of this appellee and the said claim record card was a part of the record before the Appeals Examiner.

8. This appellee admits the allegations that appellant timely appealed and that Harris did not appear at the hearing before the Board but denies the remaining allegations of this paragraph. This appellee affirmatively states that the appellee's claim record card containing his

and the Contact Representative's certification as to his availability were before this appellee at the hearing held before it on April 5, 1965.

9. This appellee denies the allegations of this paragraph.

10. This appellee denies the allegations of this paragraph.

/s/ LOUIS MACKALL
Attorney for Appellee

ANSWER

Comes now the appellee, John L. Harris, and answers the Appeal as follows:

First Defense

Appeal fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the appeal as follows:

1. This appellee admits the allegations of this paragraph.

2. This appellee admits the allegations of this paragraph.

3. This appellee admits the allegations of this paragraph.

4. This appellee admits the allegations of this paragraph.

5. This appellee admits the allegations of this paragraph with the exception of the allegation that this appellee was paid benefits for the week ending February 27. This appellee received benefits only for the weeks ending March 6, March 13, and March 20.

6. This appellee admits the allegations of this paragraph.

7. This appellee admits not appearing before the Appeals Examiner at the scheduled hearing on April 5, 1965. After conversations with officials of both the appellee District of Columbia Unemployment Compensation Board and appellant Woodward & Lothrop, Inc., this appellee ascertained that his former employers were specifically charged for unemployment benefits received by him, whereupon this appellee voluntar-

evidently leaving only place where the record is made.

ily withdrew his claim for such benefits. After his conversation with an official of the appellant Woodward & Lothrop, Inc., this appellee understood that the appellant was withdrawing the appeal. For this reason this appellee did not appear at the scheduled hearing. This appellee had previously certified before an official of the District of Columbia Unemployment Board as to his availability and active search for employment.

8. This appellee admits the allegations that appellant timely appealed and that this appellee did not appear at the hearing before the Board. This appellee received no notice of this hearing and was not aware that such a hearing was taking place.

9. This appellee denies the allegations of this paragraph.

10. This appellee denies the allegations of this paragraph.

/s/ JOHN L. HARRIS, Appellee

[Filed October 28, 1965]

MOTION OF APPELLEE FOR SUMMARY JUDGMENT

Comes now the appellee, the District Unemployment Compensation Board, by its attorneys and moves for summary judgment in its favor against the appellant on the pleadings and the findings in the Board's decision of May 18, 1965. For grounds of this motion appellee says:

1. That there are no triable facts in dispute.

2. That there remain to be determined by the Court only questions of law.

3. That the findings of fact of this appellee in its decision of May 18, 1965 and of the Appeals Examiner of this Board in his decision of April 15, 1965 that claimant has made a prima facie case of availability are supported by substantial evidence.

4. That the decision of the appellee, the District Unemployment Compensation Board on May 18, 1965 is in accordance with the facts.

5. For such other grounds as may be called to the attention of the Court at the time of the hearing on this motion.

/s/ JAMES M. PORTRAY, JR.
Attorney for Appellee
District Unemployment Compensation Board

[Filed October 28, 1965]

APPELLEE STATEMENTS OF MATERIAL UNDISPUTED FACTS

1. The claimant-appellee registered for work with the U.S. Employment Service and received a work classification of (1) secretary and (2) bookkeeper. (R-1-2-2A)

2. That claimant-appellee certified that he was able to work and available for work as classified. (R-2)

3. That claimant's-appellee's sole base period employer was the Madison Hotel, Inc., where he worked as a credit manager and during his base period (12 months) he was paid $6,331.60.

4. That after being separated on December 26, 1964, claimant-appellee did not immediately file a claim for benefits but initiated the claim on February 25, 1965. On March 9, he filed a claim for a waiting period and one compensable week, being the weeks-ending February 27, 1965, March 3, 1965; and on March 16 and March 22, 1965 he filed claims for compensable weeks ending March 13, 1965 and March 20, 1965. On each of these four claims, the claimant-appellee, certified that he was available for work. Interviewers of the Board approved the said claims for payment. Claimant has not been to our claims office since March 22, 1965.

/s/ JAMES M. PORTRAY, JR.

[Filed November 12, 1965]

MOTION OF APPELLANT FOR SUMMARY JUDGMENT AND OPPOSITION TO APPELLEE BOARD'S MOTION FOR SUMMARY JUDGMENT

Appellant Woodward & Lothrop, Inc., through its attorneys, moves for summary judgment in its favor against both appellees in the above-captioned case and to deny appellee Board's motion for summary judgment. As grounds therefor, appellant refers the Court to the Memorandum of Points and Authorities attached hereto and prayed to be read as a part hereof, and further states:

1. There is no genuine issue of material fact.

2. That the only questions to be determined by the Court are questions of law.

3. That the decision of appellee Board of May 18, 1965, affirming the decision of its appeals examiner, is not based upon substantial evidence in the record considered as a whole and is therefore not in accordance with law.

4. For such other grounds as may be called to the attention of the Court.

HOGAN & HARTSON

JOHN J. ROSS
PIERRE J. LAFORCE
Attorneys for Appellant

[Filed November 12, 1965]

STATEMENTS OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE (PURSUANT TO LOCAL RULE 9)

1. Appellee Harris was last employed by appellant from November 24, 1964 to December 26, 1964.

2. On securing employment with appellant, appellee Harris executed an employment form which indicated a procedure to follow in the event

that an employee might desire permanent employment. Appellee Harris did not follow this procedure.

3. Appellee Harris initiated a claim for unemployment compensation benefits on February 25, 1965.

4. Appellee Harris filed claims with appellee Board on March 9, March 16 and March 22. Appellee Board's claims examiner found appellee Harris eligible for benefits on March 9. Appellee Harris received unemployment compensation benefits for the weeks ending March 6, March 13, and March 20.

5. Appellant, by letter dated March 17, 1965, offered appellee Harris permanent employment. Appellee Harris declined this offer.

6. Appellant appealed the initial determination of March 9. A hearing on this appeal was held by appellee Board's appeals examiner on April 5, 1965. Appellee Harris did not appear at the hearing.

7. No evidence was presented by appellee Harris at the April 5 hearing. The only evidence introduced at the hearing to support Appellee Harris' claim of availability was appellee Harris' claims record with appellee Board.

8. Appellee Board's appeals examiner affirmed the initial determination allowing benefits on April 15, 1965.

9. Appellant appealed the appeals examiner's decision to appellee Board.

10. A hearing was held on this appeal before appellee Board on May 11. Appellee Harris did not appear at this hearing. No further evidence was introduced to support appellee Harris' claim for benefits.

11. By decision dated May 18, 1965, appellee Board affirmed the decision of its appeals examiner.

HOGAN & HARTSON

JOHN J. ROSS
PIERRE J. LAFORCE
Attorneys for Appellant

[2] **EXCERPTS FROM PROCEEDINGS**
[January 12, 1966]

THE COURT: At the outset, I would like you to address yourself to the observation of Mr. Portray that Madison has paid, not Woodward & Lothrop, the amounts assessed for unemployment compensation; that Madison hasn't challenged the assessment of these payments; that nothing adverse inures to Woodward & Lothrop because of this decision. And the Court under the circumstances would question the standing of Woodward & Lothrop to challenge the decision of the Board.

* * *

[3] THE COURT: The Court was interested in knowing the nature and character of your standing. I concede that you have nominal standing to be here, otherwise you would not be here. You are here and I will listen to you. But the Court is interested in the extent to which your client stands to lose anything as a result of this case.

* * *

[4] THE COURT: If Woodward & Lothrop stood to lose anything by reason of these payments, the Court might consider your argument had some merit. But here, on this record, I am disposed to grant the motion of the Board.

* * *

[Filed January 12, 1966]

ORDER

Upon consideration of the motion of the appellee for summary judgment and the cross motion of appellant in opposition, together with points and authorities on behalf of both motions and after hearing an oral argument thereon in open Court, it is by the Court this 12th day of January, 1966,

ADJUDGED AND ORDERED that the appellant's motion in opposition to appellee's motion for summary judgment be and hereby is denied, and it is further

ADJUDGED AND ORDERED that the appellee's motion for summary judgment be and hereby is granted.

/s/ OLIVER GASCH
Judge

[Filed February 8, 1966]

NOTICE OF APPEAL

Notice is hereby given this 8th day of February, 1966, that appellant, Woodward & Lothrop, Inc., hereby appeals to The United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 12th day of January, 1966, in favor of appellees, District of Columbia Unemployment Compensation Board and John L. Harris, and against said appellant, Woodward & Lothrop, Inc.

HOGAN & HARTSON

/s/ JOHN J. ROSS
/s/ PIERRE J. LAFORCE
Attorneys for Appellant

BRIEF FOR APPELLEE
DISTRICT UNEMPLOYMENT COMPENSATION BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,048

WOODWARD & LOTHROP, INC., *Appellant*,

v.

DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION BOARD

and

JOHN L. HARRIS, *Appellees.*

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JAMES M. PORTRAY, JR.

F. G. GORDON, JR.

GEORGE A. ROSS

Attorneys for Appellee

District Unemployment Compensation Board
Employment Security Building
Sixth and Pennsylvania Avenue, N.W.
Washington, D. C. 20001

STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee, the District Unemployment Compensation Board, the sole question before the Court is whether there is substantial evidence in the record to show that appellee-claimant Harris was available for work.

INDEX

SUBJECT INDEX

CASES CITED

DISTRICT OF COLUMBIA CODE, 1961, CITED

*Cases and statutes chiefly relied on.

NOTE: All underlined statements appearing in brief have been added for emphasis only.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,048

WOODWARD & LOTHROP, INC.,

Appellant,

v.

DISTRICT OF COLUMBIA UNEMPLOYMENT
COMPENSATION BOARD and
JOHN L. HARRIS,

Appellees.

Appeal from an Order of the United States District
Court for the District of Columbia

BRIEF OF APPELLEE
THE DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION BOARD

COUNTER - STATEMENT OF THE CASE

On February 25, 1965, appellee-claimant Harris, hereinafter referred to as claimant, filed a claim for unemployment benefits with the appellee, District Unemployment Compensation Board, hereinafter referred to as Board. (J.A.2-5). A formal notice of filing anda request for submission of a separation report, within 48 hours, was promptly mailed to last employer, appellant- Woodward & Lothrop, Inc., on the above-mentioned date. The appellant responded with a report of separation, dated March 2, 1965, showing last date worked December 26, 1964 and reason for separation, "Violation of company rules."

Thereafter on March 9, 1965, claimant reported to the Board and certified before a claims deputy, regarding his last employment, as follows:

> "I was laid off on December 26, 1964 due to termination of Christmas work. I violated no company rules according to my knowledge. I was hired as a temporary Christmas employee and my work ended on December 26, 1964." (J.A. 3)

The claims deputy contacted Mr. S. W. Workman, appellant's Employment Manager, by telephone, to confirm his prior report or affirm the statement made by claimant. Mr. Workman replied:

> "Claimant was hired on a temporary basis to end on or about December 24, 1964 and that if claimant wanted additional work beyond that period he was supposed to sign a Certicate of Availability. That claimant's

> temporary work ended on December 26, 1964 and could not state whether claimant would have gotten additional work for sure if he had signed and turned in the Certificate of Availability." (J.A. 3)

The claims deputy after ascertaining that claimant was in fact separated from last employment due to the end of temporary work ruled as follows as provided in Section 46-311 (b), D. C. Code, 1961 Edition:

> "Eligible as of O. C. (original claim) date. No disqualification. John C. Harden; 3-9-5." (J.A. 3).

Claimant then further certified that for the week-ending February 27, 1965 (waiting period) and week-ending March 6, 1965, he was able to work and available for work as prescribed by Section 46-309 (a),(c), (d), (e), D. C. Code, 1961 Edition. (J.A.4).

A "Notice to Last Employer" was mailed March 9, 1965, to appellant disclosing that claimant had been determined eligible for benefits and that as last employer it had a right to appeal within ten (10) days from the mailing date of the notice. (J.A. 3). On March 16, 1965, claimant filed a claim for the week-ending March 13, 1965 and on March 22, 1965 filed a claim for week-ending March 20, 1965. At the time of each filing, claimant certified that he was able to work and available for work. Interviewers of the Board approved the three claims (3 x $53 = $159) for payment. The claimant has not returned to the claims office to file for additional benefits since March 22, 1965.

The claimant's sole base period employer was the Madison Hotel, inc., where he worked as credit manager and during the base period (October 1, 1963 to September 30, 1964) was paid $6,331.60 in wages. The base period employer's account was assessed for the payment of benefits to claimant ($159.00) and the appellant, not being a base period employer, was not and will not be charged for any benefits paid to claimant. (Section 46-303 (9) (c), (d), (e), D.C. Code, 1961 Edition)

Prior to filing a claim for benefits, claimant was instructed and required to register for work and obtain a work classification by the United States Employment Service. He received a work classification of (1) secretary (2) bookkeeper. (J.A.2). This is a basic requirement under the District of Columbia Unemployment Compensation Act. (Section 46-309 (d), D.C.Code, 1961 Edition.)

On March 18, 1965, the appellant filed an appeal to the claims deputy's determination, dated March 9, 1965, alleging that claimant was not available for suitable work. Prior to filing the appeal, appellant on March 17, 1965, wrote a letter to claimant offering him a job as a salesman, paying $1.50 an hour. (J.A. 6). Claimant refused the offer. The appeal hearing was scheduled for April 5, 1965.

Claimant did not appear at the hearing on April 5, 1965 because after his discussion with an official of appellant,

Woodward & Lothrop, Inc., he told them he was not going to claim any further benefits and he understood that they were abandoning their appeal. (J.A. 13).

The Board's Appeals Examiner affirmed the decision of the claims deputy allowing benefits without disqualification and also ruled that the offer of work, (salesman) was not suitable. (Section 46-310 (c), D.C. Code 1961 Edition.) (J.A. 8-9).

The appellant appealed to the District Unemployment Compensation Board and the Compensation Board, on May 18, 1965, by resolution, affirmed the decision of the Appeals Examiner. (J.A. 9).

Thereafter, appellant filed an appeal in the United States District Court for the District of Columbia. (J.A. 10).

The United States District Court for the District of Columbia on January 12, 1966 granted the cross motion of appellee Board for summary judgment. (J.A. 18). This appeal followed on February 8, 1966. (J.A. 19).

STATUTES INVOLVED

District of Columbia Code, 1961 Edition:

Section 46-303 (9) Employer Contributions

* * * * * * * * *

"(c) The term 'base period wages' means the wages paid to an individual during his base period for employment;

"(d) The term 'base period employers' means the employers by whom an individual was paid his base period wages;

"(e) The term 'most recent employer' means that employer who last employed such individual immediately prior to such individual's filing an initial claim for benefits."

Section 46-309 Eligibility for Benefits

* * * * * * * *

Sec. 9. An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the Board--

"(a) That he has made a claim for benefits with respect to such week in accordance with such regulations as the Board may prescribe;

"(c) That he is physically able to work;

"(d) That he is available for work and has registered and inquired for work at the employment office designated by the Board, with such frequency and in such manner as the Board may by regulation prescribe: Provided, That failure to comply with this condition may be excused by the Board upon a showing of good cause for such failure; and the Board may by regulation waive or alter the requirements of this subsection as to such types of cases or situations with respect to which it finds that compliance with such requirements would be oppressive or would be inconsistent with the purposes of this Act.

"(e) That he has been unemployed for a waiting period of one week. ***"

Section 46-310 Disqualification for Benefits

* * * * * * * * *

"(c) If an individual otherwise eligible for benefits fails, without good cause as determined by the Board under regulations prescribed by it, either to apply for new work found by the Board to be suitable when notified by any employment office or to accept any suitable work when offered to him by any

employment office, his union hiring hall, or any employer direct, he shall not be eligible for benefits with respect to the week in which such failure occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week, as determined by the Board in such case according to the seriousness of the refusal. In addition such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount. In determining whether or not work is suitable within the meaning of this subsection the Board shall consider (1) the physical fitness and prior training, experience and earnings of the individual, (2) the distance of the place of work from the individual's place of residence, and (3) the risk involved as to health, safety, or morals."

Section 46-311 Determination of Claims

* * * * * * * *

"(b) Promptly after an individual has filed a claim for benefits, an agent of the Board designated by it for such purpose shall make an initial determination with respect thereto which shall include a determination with respect to whether or not such benefit may be payable, and if payable, the week with respect to which payments will commence, the maximum duration thereof, and the weekly benefit amount, except that in any case in which the payment or denial of benefits will be determined by the provisions of section 10(e) of this Act, the agent shall promptly transmit such claim to an appeal tribunal which shall make a decision thereon after such investigation as it deems necessary, and after affording the parties opportunity for fair hearing in accordance with subsection (e) of this section, and the claimant and interested parties shall be given notice thereof and permitted to appeal therefrom to the Board and the courts as is provided in this Act for notice of, and appeals from, decisions of appeal tribunals. An

initial determination may, for good cause, be reconsidered. The claimant and other parties to the proceedings shall be promptly notified of the initial determination or any amended determination and the reasons therefor. Benefits shall be denied or, if the claimant is otherwise eligible, paid promptly in accordance with such initial determination except as hereinafter otherwise provided. The claimant or any party to the determination may file an appeal from such initial determination or from a reconsideration of such determination within ten days after notification thereof, or after the date such notification was mailed to his last known address. If upon such initial determination benefits are allowed but the record of the case indicates that a disqualification has been alleged or may exist, benefits shall not be paid prior to the expiration of the period for appeal as hereinbefore provided. If an appeal is duly filed with respect to a matter other than the weekly benefit amount or maximum duration of benefits payable, benefits with respect to the period prior to the final decision of the Board shall be paid only after such decision: Provided, That if an appeal tribunal affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken. If, subsequent to such initial determination, benefits with respect to any week for which a claim has been filed are denied for reasons other than matters included in the initial determination, the claimant shall be promptly notified of the denial and the reasons therefor, and may appeal thereform in accordance with the procedure herein described for appeals from initial determinations."

Section 46-312 Court Review

* * * * * *

"(a) Within thirty days after the decision of the Board has become final, any party to the proceeding may appeal from the decision to the District Court of the United States for the District of Columbia. Upon the filing of any

such appeal notice thereof shall be served upon the Board by the appellant and upon any other party to the proceeding. Such appeal shall be heard by the court at the earliest possible date and shall be given precedence over all other civil cases. It shall not be necessary on any such appeal to enter exceptions to the rulings of the Board and no bond shall be required for entering such appeal. In no event shall any appeal act as a supersedeas. In any appeal under this section the findings of the Board, or of the examiner or appeal tribunal, as the case may be, as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law: Provided, That no appeal shall be permitted under this section by any party who has not first exhausted his administrative remedies as provided by this Act."

SUMMARY OF ARGUMENT

A procedural issue has been injected by appellant because the lower court questioned its standing. The court did not commit error as it was a proper exercise of its judicial discretion in determining whether or not appellant was in fact, aggrieved by the decision of the Board. The issue before the court was not whether or not the "Trust Fund" would drop or the experience rating of employer-contributors would be increased, as a result of disbursements to claimant.

The Board concedes that the burden of proof is on the claimant to establish his eligibility. However, once the claimant has met all of the requirements of the District

of Columbia Unemployment Compensation Act entitling him to benefits, and none of the conditions are present disqualifying him from benefits under the relevent sections of the Act, then the burden of proceeding shifts to the appellant. The appellant must bear the burden of proof on each fact essential to his defense.

There is no eligibility provision in the District of Columbia Unemployment Compensation Act requiring a claimant to be actively seeking work at the time a claim is filed. The legislatures of 28 states have passed laws adding this provision to their unemployment compensation statute.

So long as free enterprise is existent in this country no claimant should be fettered by signed statements obtained by employers regarding an employee's availability. The "Statement of Availability for Temporary Employment" form obtained by appellant from the claimant in November 1964 and claimant's failure to execute the reverse side of the statement have been offered as facts evidentiary of non-availability of claimant. At most these are self serving declarations and should not be allowed to alter the standard operating procedure of the Board.

It would be unconscionable to allow appellant to take advantage of claimant's absence from both hearings when

it appears that it was appellant who lulled the claimant into believing that the appeal would be abandoned.

Inasmuch as the finding of availability is a question of fact and the trial court reviewed the evidence contained in the record and upon ascertaining that the findings were supported by the evidence, it is clear that the contentions of appellant are without merit.

ARGUMENT

I

Standing of Appellant

The standing of appellant is not in issue, the mere question is whether or not the individual claimant was available for work. The argument of appellant is specious because in the event all employers who contribute to the fund, elected to challenge benefit claims merely because they are contributors, then this Board would be submerged with appeals from 20,000 employers. To put appellant's argument in the proper context, it appears that the lower court was "judicially shocked" upon being advised that appellant had suffered no financial loss as a result of appellee Harris' claim. It is submitted that the District Court did not exceed its discretion or commit error by examining the aggrieved posture of this interested employer.

II

Burden of Proof

In the early 1930's Congress and the Legislatures of

a vast majority of the states enacted laws for the payment of unemployment compensation for the sole purpose of alleviating economic distress among the jobless and their families. From that period to the present, the District Unemployment Compensation Board has been making determinations as to who is and who is not able to work and available for work within the framework of our Act. (Section 46-3C9 (c), (d), D.C. Code) Supra.

It is further submitted that in appeals, where the parties are claimant versus Unemployment Compensation Board or Commission or vice versa, the burden of proving eligibility is directly upon the claimant. Jasper Veneer Mills, Inc., v. Employment Security Commission (Indiana Appellate Court) 147 N. E. 594. Haynes v. Unemployment Compensation Commission (1944) 183 S.W. (2d) 77. In the instant case, however, the government (Board) has determined that the claimant is available. The issue of non-availability is subsequently raised by the employer and the Board contends that the burden is on the employer to prove that the decision of the Board is contrary to law. It is interesting to note that appellant cites on page 12 of its brief the following cases to substantiate its argument that the burden of proof was on the claimant, to this we agree: Hudson v. Hecla Mining Co.; Farrar v. Director of Division of Employment Security; Clapp v. Appeal Board; Virginia Employment Commission v.

Coleman; Haynes v. Unemployment Compensation Commission and Hyman v. South Carolina Employment Security Commission. In each of the above cases the controversy was between claimant and the agency charged with the duty of establishing eligibility for unemployment benefit payments. Common sense and experience may be utilized in concluding that one who challenges a finding should offer satisfactory evidence in rebuttal of it. The court stated in Haynes v. Unemployment Compensation Commission - cited on page 12, by appellant:

> "An unemployed individual is eligible to receive benefits only if the Commission finds that the required conditions have been met."

It is an elementary rule of evidence that a claimant must prove facts which are essential elements of his claim. Claimant has the burden of proof as to these facts. If a fact is essentially a defense, the litigant who interposes this defense has the burden of proving it.

III

Active Search for Work

In addition to registration for work at a local employment office, 28 State laws require that a claimant be actively seeking work or making a reasonable effort to obtain work.[1]

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[1]Comparison of State Unemployment Insurance Laws (1964), United States Department of Labor -- W. Willard Wirtz, Secretary -- Manpower Administration in Bureau of Employment Security, Washington, D.C.

Appellant cites, Huiet v. Schwab Mfg. Co., 196 Ga 855, (1943); Ashford v. Appeal Board, 328 Mich. 428; General Motors Corp. v. Baker, 92 Ohio App 301; and Shannon v. Bureau of Unemployment Compensation, 155 Ohio St. 53, as being relevent cases in point on the issue of availability. In each of the above jurisdictions, Georgia, Michigan and Ohio, there is a statutory provision making it mandatory that an active or independent search for work is required as evidence of availability. Inasmuch as neither the District of Columbia Unemployment Compensation Act or Unemployment Compensation Law of the State of Pennsylvania specifically require that a claimant be actively seeking work, the Board believes the best authorities for the availability issue are:

White v. Unemployment Compensation Board of Review, 180 A 2d 89 (Penn. 1962)

Dancho v. Unemployment Compensation Board of Review, 1966 A 2d 81 (Penn. 1940)

In Bliley Electric Company v. Unemployment Compensation Board of Review, 45 Atl. (2d) 898, the Superior Court of Pennsylvania states, in part:

> "Presumably, an unemployed worker in a covered employment is entitled to benefits, and loses them only when he falls under the condemnation of a disqualifying provision of the act, fairly, liberally and broadly interpreted. The act provides ...'Compensation shall be payable to any employee who is or becomes totally unemployed...and who...(b) Has registered for work at a designated employment office...(d) Is able to work and available for work ... The basic purpose of these requirements is to establish that a claimant is actually and currently attached to the labor force, just as the wage-credit

provision...assures the payment of benefits only to claimants who have a prior record of attachment to the labor force. Registration for work is the first requirement, and ordinarily it will be presumed that a claimant who registers is able and available for work. By registering the claimant makes out a prima facie case of availability which is of course rebuttable for countervailing evidence, e.g., refusal of referred work, illness, inability due to superannuation, and other conditions.

"..So long as the claimant is ready, willing and able to accept some substantial and suitable work he has met the statutory requirements. By the same token, the availability rule does not necessarily require that a claimant be available for his most recent work or his customary work. It is sufficient if he is able to do some type of work, and there is reasonable opportunity for securing such work in the vicinity in which he lives."

The appellant contends that the claimant was not available for work because there was nothing in the record to show an active search for work. To this allegation, suffice it to say, there is no provision in the District of Columbia Unemployment Compensation Act stipulating that a claimant must show an active search for work prior to being determined eligible for benefits. It is submitted that the legislatures in those jurisdictions having enacted laws requiring an "active search for work" did so, because it was vitally necessary. This Board by administrative policy, assures itself periodically during the course of each claim, that claimants are genuinely attached to the labor market and are making adequate contacts for work as the facts, exigencies, and circumstances in each individual

case so warrant.

On page 14 of its brief, appellant cites Cramer v. Employment Security Commission, 90 Arizona 350. This case involved an appeal by a claimant and is not on "all fours" with the contention of appellant. The question of availability involved a claimant who refused to report to the employment service for a job interview as directed and was accordingly ruled not available for work. The Arizona Supreme Court in affirming the decision of the Employment Security Commission stated, in part:

> "Availability is an eligibility requirement found in the unemployment compensation law of every state. It is difficult to precisely define. It must be determined from and in the light of the circumstances of each case."

The argument of the Board regarding burden of proof, is crystallized in the above cited case. Briefly, the claimant filed a claim for benefits. He was later referred to the employment service for a job interview. Claimant refused and was ruled not available for work by the Employment Commission. Claimant filed an appeal. In upholding the decision of the Commission, the court held that claimant had failed to sustain the burden of proving his claim. We agree in all respects to this decision, it is authority for the proposition, that once a prima facie showing of eligibility has been made, it then becomes

necessary for the opposing litigant to offer countervailing evidence to rebut the facts presented by claimant. The countervailing evidence in the Cramer case, being "the refusal of claimant to report to the Employment Service for a job interview." In the case before this Honorable Court, the parties are unlike those in Cramer, we have here an adversary who challenges the decision rendered between claimant and the Board. This adversary, however, has not offered any suitable evidence to rebut the decision of the Board.

Finally, on this point, appellant cites, Ashford v. Appeal Board, 328 Mich. 428. This action was by a claimant against the Appeal Board of the Michigan Unemployment Commission. In this cited case the facts reveal that during the course of an appeal hearing the referee refused to allow employer to direct questions at the claimant unless the employer agreed to make claimant his witness. The court was concerned primarily with the reckless,arbitrary and despotic conduct of the referee and was not concerned with facts peculiar to the case at bar.

IV

Appellant's "Statement of Availability for Temporary Employment" Form

The record shows that claimant during a period of emergency accepted a temporary Christmas job with appellant. Before he was permitted to work claimant was

required and did sign employer's form labeled "Statement of Availability for Temporary Employment". He was also asked to execute the reverse side of the form which related to continued employment. Claimant did not sign this agreement.

The Board will not dwell on the employment practices or internal management procedures of appellant. A claimant, however, who files a claim for benefits is judged solely by the availability requirements of our law and any unsuspecting statements, agreements, or admissions made by the claimant with an employer, seeking to predetermine his availability for future unemployment compensation, cannot be given legal status under the Act. It is submitted that, at most, such "Statements" should be dismissed as self-serving documents.

Finally, the appellant contends that the claimant's absence at both hearings conducted by the Board raises an inference that the claimant could not sustain his claim of availability. It is elemental that in an adversary proceeding, the moving party is privileged to demand the presence of a witness by timely requesting the Board to issue a subpoena. Appellant did not request the Board to subpoena claimant or request a continuance for that purpose. The record discloses claimant's statement, in his answer, as to why he did not appear. It reveals that he had been

wrongfully informed that appellant was being charged for benefits paid to him. Claimant then told appellant he would no longer file for benefits and understood that appellant would not pursue his appeal and in reliance upon this statement claimant acted and did not appear at the hearings. There is but one conclusion and that is such conduct warrants the application of the doctrine of estoppel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

JAMES M. PORTRAY, JR.

F. G. GORDON, JR.

GEORGE A. ROSS

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,048

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,048

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

COUNTERSTATEMENT OF CASE

As its Counterstatement, appellant adopts, and refers this Court to, the Statement of the Case appearing at pages 2-4 of its brief.

SUMMARY OF ARGUMENT

Appellant had standing under the Act to prosecute an appeal from the decision of appellee Board. The trial court committed error in af-

firming the decision of appellee Board on the basis of the trial court's characterization of appellant as having "nominal standing."

A review of the governing law indicates clearly that mere registration and filing for benefits are not sufficient to establish a claimant's entitlement thereto. The view posited by appellee Board has met with almost universal rejection. Inherent in the availability concept in the District of Columbia statute is the requirement that a claimant actively search for work. In showing eligibility a claimant must demonstrate active work search. No such showing was made in the instant case and the decision of appellee Board was invalid as a matter of law.

The record evidence, rather than offering support for appellee Board's finding, demonstrates appellee Harris' *unavailability*. Further, the record evidence in no way supports appellee Board's estoppel argument.

ARGUMENT

I

The Trial Court Committed Error in Basing Its Decision on Its "Nominal Standing" Characterization of Appellant

Appellee Board states in its brief that the sole question in this case is "whether there is substantial evidence in the record to show that appellee-claimant Harris was available for work" and that there is no warrant for interjection of the standing issue. Appellee Board conveniently forgets the trial court's disposition of the instant case. The trial court indicated, at least inferentially, that its "nominal standing" characterization of appellant had a material bearing on its decision. (J.A. 18) Appellee Board would justify this as an allowable exercise of the trial court's discretion. To the contrary, this is not an area of judicial discretion. Appellant submits that it had standing under the Act and that

the trial court committed error in basing its decision on its view of appellant as having "nominal standing" only. To adopt appellee Board's position would result in two sets of governing principles, one for parties with "substantial standing," another for those with "nominal standing." Orderly administration of the Act dictates that there only be *one* interpretation of the statute.

II

The Applicable Authorities Conclusively Demonstrate That Appellee Board's Decision Was Invalid as a Matter of Law

In its argument II, at pages 11-13 of its brief, appellee Board apparently confuses the evidentiary principles relating to the determination of a claim for benefits and the rules governing reviewability of an administrative finding. Clearly, in the latter instance, the party seeking reversal must show some invalidating defect. This, however, has nothing to do with the well-settled rule that an unemployment compensation claimant has the burden of showing eligibility and, as an essential element thereof, availability. (See Brief for Appellant at 11-13.)

Appellant's position throughout this case has been that appellee Harris has not sustained this burden of proof, that filing for benefits and registration with the employment service do not establish availability and that, consequently, appellee Board's decision in the instant case was invalid since it was not supported by competent, substantial evidence in the record as a whole.

Appellee Board has held, however, that a *prima facie* case was made out by appellee Harris' registration and weekly reporting. (J.A. 9) Appellant has previously demonstrated that this view has met with almost universal rejection. (Brief for Appellant at 14.) Appellee would distinguish *Huiet v. Schwab Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943); *Ashford v. Appeal Bd.*, 328 Mich. 428, 43 N.W.2d 918 (1950), and *Shannon v.*

Bureau of Unemployment Compensation, 155 Ohio St. 53, 97 N.E.2d 425 (1951), on the basis that the applicable statute in each of these cases contained an express statutory requirement that a claimant actively search for employment. Yet, it is clear that this is not a distinguishing factor since the active work search element is inherent in the availability concept. Express statutory incorporation has been held to be simply legislative clarification of the active search requirement. See, *e.g.*, *Cramer v. Employment Security Comm'n*, 90 Ariz. 350, 367 P.2d 956, 959 (1962); *Neukirk v. Florida Indus. Comm'n*, 142 So. 2d 750, 752 (Fla. App. 1965); *Shannon v. Bureau of Unemployment Compensation, supra*, 97 N.E.2d at 427. Additionally, a closer reading of these cases by appellee Board would have readily disclosed that this "distinction" has no validity.

In the *Shannon* decision the opinion clearly shows that the case was decided on the basis of the statute as it existed *before* express incorporation of the active search requirement. See 97 N.E.2d at 427. Further, the court there expressly stated: "This amendment, we believe, merely clarifies and does not change the meaning of the word 'available' as it appeared in the statute previous to the amendment." *Ibid.*

In *Huiet v. Schwab Mfg. Co., supra*, the opinion also clearly shows that the decision was based on a construction of the word "available" as it appeared in the statute and not on any express statutory requirement of active work search.

Finally, in *Ashford v. Appeal Bd., supra*, the court based its decision on the earlier case of *Dwyer v. Appeal Bd.*, 321 Mich. 178, 32 N.W.2d 434 (1948). (See 43 N.W.2d at 920.) This earlier case was decided *before* amendment of the basic statute. The *Dwyer* court held that mere registration and reporting were insufficient to show availability and that the later amendment "was enacted for the purpose of clarifying existing legislative intent." 32 N.W.2d at 437; *id.* at 438 (concurring opinion).

It is clear, therefore, that appellee Board cannot so readily or speciously distinguish these cases, which appellant has stated — and reasserts here — are controlling authorities.

Appellee Board seeks to support its position on the Pennsylvania cases cited at page 14 of its brief. Yet, it is obvious that in none of these cases did the court rule on the question presented to this Court, *viz.*, whether mere filing and registration by an unemployment compensation claimant is sufficient to establish availability. Instead, each of these cases dealt with dissimilar facts and issues. A reading of these cases reveals that the propositions upon which appellee Board relies are the most obvious kind of dicta. These cases are completely inapposite and shed no light on the question at issue here.

Appellee Board responds to the established rule that a claimant must show active work search by asserting that there is no *express* requirement of work search in the District of Columbia statute. As already demonstrated, active work search is inherent in the availability concept itself. Further, it is suggested that appellee Board presents here a somewhat different posture than that taken by it in *AEM, Inc. v. Ecke*, 106 U.S. App. D.C. 240, 271 F.2d 506 (1959). The record in that case shows that the Board made *findings* as to active search for employment. *Id.* at 241, 271 F.2d at 507.

Appellee Board informs this Court that, by administrative policy, it "assures itself periodically" of the active work search efforts of claimants. This "administrative policy" however, is not to be found in the promulgated regulations of appellee Board. Nor is there a scintilla of evidence in the instant record that appellee Board "assured itself periodically" of appellee Harris' active work search efforts. Appellant submits that, since active work search is an essential element of availability, a finding must be made thereon in determining eligibility. It is clear from the record that no such finding was ever made in the instant case nor was any evidence ever offered with respect thereto.

Finally, appellee Board's reading of *Cramer v. Employment Security Comm'n*, 90 Ariz. 350, 367 P.2d 956 (1962), leaves appellant somewhat baffled. Appellee Board states, at pages 16-17 of its brief: "*We agree in all respects to this decision,* it is authority for the proposition that once a prima facie showing of eligibility has been made, it then becomes necessary for the opposing litigant to offer countervailing evidence to rebut the facts presented by claimant." (Emphasis added.) The *Cramer* case, of course, specifically held "that the burden of proving availability is upon the claimant and . . . the mere act of registration gives him no procedural advantage in establishing the merits of his claim." 367 P.2d at 959. Appellant is at a loss to reconcile appellee Board's complete agreement with *Cramer* and its position in the instant case.

III

The Record Evidence Does Not Support the Decision of Appellee Board

In discussing appellant's employment form, appellee Board seems to picture some sinister, ulterior motive on the part of appellant in the use of said form and its introduction in the instant case. Of course, such a characterization is highly inaccurate. Appellant in no way seeks to usurp appellee Board's administration of the Act nor to cast red herrings in its path. Instead, introduction of this employment form — indicating a procedure for securing permanent employment — was based on its relevance to the availability question. As such, it was material and probative.

Appellee Board also makes the surprising argument that it was incumbent on appellant to resort to the subpoena power of the Board to prove the availability of appellee Harris. Appellee Board apparently ignores, or is unaware of, the teachings of such cases as *Wolfgram v. Employment Security Agency*, 75 Idaho 389, 272 P.2d 699 (1954) and

Krauss v. A. & M. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1953), which held that it is the *statutory duty* of the Board to build a record supported by reasonably conclusive evidence. The burden of proving availability was on appellee Harris and appellant was under no duty to establish his eligibility for benefits. See *Hyman v. South Carolina Employment Security Comm'n*, 234 S.C. 369, 108 S.E.2d 554, 556 (1959).

One final word of comment should be made with respect to appellee Board's several references to that part of appellee Harris' Answer (J.A. 13-14) relating to his reasons for not appearing at the various hearings in the instant case. To begin, it should be noted that this "record evidence" is only an *unverified allegation* in a pleading. As such, it cannot serve as an evidentiary or record basis for the many inferences and insinuations (mostly inaccurate and unwarranted) drawn from it by appellee Board. There is no competent evidence in the instant record to substantiate either appellee Harris' allegation or the insinuations drawn therefrom by appellee Board. Appellee Board's estoppel argument is therefore without factual basis.

CONCLUSION

In summary, appellant submits that appellee Board has in no way rebutted or distinguished the position presented by appellant in its brief. Nor has appellee Board supported its position with any competent authority. To the contrary, the controlling authorities demonstrate that the decision of appellee Board in the instant case was without legal foundation and should be reversed.

Respectfully submitted,

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